

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CENTER FOR DEMOCRACY & TECHNOLOGY, *et al.*,

Plaintiffs,

v.

No. 03-5051

GERALD J. PAPPERT, Acting Attorney General of the
Commonwealth of Pennsylvania,

Defendant.

PLAINTIFFS' REVISED PROPOSED CONCLUSIONS OF LAW

Plaintiffs hereby submit these Revised Proposed Conclusions Of Law. Each individual Conclusion of Law contains citations to the relevant paragraphs of the Revised Proposed Findings of Fact, as well as the relevant pages of Plaintiffs' memoranda of law filed in this case. Although not called for by this Court's March 4, 2004, order, Plaintiffs believe this submission will provide the Court with a useful guide to the facts and briefing relevant to each legal issue it must address. This document incorporates by reference Plaintiffs' Revised Proposed Findings of Fact; it is submitted as a separate document to facilitate convenient cross-referencing between the two documents. In references below, the following abbreviations will be used:

“Opening Brief”	Memorandum in Support of Plaintiffs’ Motion for Declaratory Relief and for Preliminary and Permanent Injunctive Relief (filed Dec. 12, 2003)
“Reply Brief”	Plaintiffs’ Reply Memorandum in Support of Plaintiffs’ Motion for Declaratory Relief and for Preliminary and Permanent Injunctive Relief (filed Dec. 31, 2003)
“Supp’l Brief”	Plaintiffs’ Supplemental Memorandum in Support of Plaintiffs’ Motion for Declaratory Relief and for Preliminary and Permanent Injunctive Relief (filed Apr. 9, 2004)
“Prop. Find.”	Plaintiffs’ Revised Proposed Findings of Fact (filed Apr. 9, 2004)

I. STANDING

A. CDT and the ACLU have standing.

1. The Center for Democracy and Technology (“CDT”), the American Civil Liberties Union of Pennsylvania (“ACLU”), and the ACLU’s members have standing to challenge the Pennsylvania Statute, 18 Pa. Stat. Ann. §§7621-7630 (the “Statute”), and associated Informal Notice scheme that restrict their ability (through their Internet Service Providers, or “ISPs”) to receive information from lawful web sites. Such censorship is an injury caused by government action that can be redressed by the requested relief.

Factual Basis: Prop. Find. Section I.B.

Legal Basis: Opening Br. pp. 19-24; Reply Br. p. 16; Supp’l Br. pp. 3-5.

2. The First Amendment protects speakers’ right to convey information as well as listeners’ right to receive it.

Legal Basis: Opening Br. pp. 20-21.

3. It does not matter that the challenged Statute does not directly regulate listeners; courts frequently find standing where listeners’ ability to receive information is interfered with by third parties limiting the transmission of information by willing speakers.

Legal Basis: Opening Br. pp. 21-22; Reply Br. pp. 15-16.

4. The ACLU can represent the interests of its members because it is a membership organization; the members would have standing to sue in their own right; the interests protected are germane to the organization’s purpose; and neither the claim nor the relief requires the participation of individual members.

Factual Basis: Prop. Find. ¶¶ 12-14.

Legal Basis: Opening Br. pp. 19-20 n.12.

5. CDT, the ACLU, and the ACLU's members also have standing to assert the correlative rights of speakers – here, web site owners – to convey information.

Legal Basis: Opening Br. pp. 22-24; Reply Br. pp. 16-19.

6. CDT and the ACLU have overbreadth standing because the statute would result in massive over-blocking of innocent speech, regardless of the fact that the over-blocking is an indirect result of the statute.

Legal Basis: Opening Br. pp. 23-24; Reply Br. pp. 18-19.

7. CDT and the ACLU have third party standing (or “*jus tertii*”) to assert the rights of blocked web site owners because: (1) CDT and the ACLU have suffered an actual injury giving them a sufficiently concrete interest in the outcome; (2) they have common interests with the web site owners whose rights they assert and can effectively advocate for them; and (3) the web site owners themselves are unlikely to bring suit because they likely do not know about the censorship in the first place, and if they do it is very expensive to bring a lawsuit, particularly when they have the alternative inexpensive option of changing web hosts to avoid the block.

Factual Basis: Prop. Find. Section I.B.

Legal Basis: Reply Br. pp. 16-19.

B. PlantageNet has standing.

8. PlantageNet, Inc., is an ISP subject to the Pennsylvania Statute. The definition of “Internet Service Provider” in the Statute is quite broad, and many (including much larger) ISPs operating in Pennsylvania rely on the same outsourcing-based business plan that PlantageNet does and do not own their own equipment.

Factual Basis: Prop. Find. Section I.C.

Legal Basis: Opening Br. p. 18; Reply Br. pp. 19-24; Supp'l Br. pp. 5-6.

9. As an ISP operating in Pennsylvania, PlantageNet has standing because it faces the prospect of becoming enmeshed in the state's criminal enforcement machinery due to an unconstitutional Statute and Informal Notice system.

Factual Basis: Prop. Find. ¶¶ 15-20.

Legal Basis: Opening Br. p. 18; Reply Br. pp. 23-24; Supp'l Br. pp. 5-6.

10. PlantageNet also has standing because the Statute and Informal Notices have already been invoked against similarly situated entities, making the threat of prosecution even more credible.

Factual Basis: Prop. Find. ¶¶ 25-26.

Legal Basis: Opening Br. pp. 18-19.

11. PlantageNet also has standing to defend its interest in being able to offer its customers the broadest range of lawful content available on the Internet.

Legal Basis: Opening Br. p. 19.

12. In addition to standing had at the outset of this litigation, Defendant's stated intention to contact PlantageNet's wholesale Internet access supplier directly (Def. Mem. at 10) threatens Plantagenet's business relations and thus its business, and provides an additional basis for standing.

Factual Basis: Prop. Find. ¶ 21.

Legal Basis: Reply Br. p. 24.

II. UNCONSTITUTIONAL PRIOR RESTRAINT OF THE USE OF PARTICULAR INTERNET URLS

13. This case presents the first instance where a state has essentially outlawed permanently the use of particular Uniform Resource Locators (“URLs”). That prohibition on speech at particular locations on the Internet, in and of itself, is a prior restraint in violation of the First Amendment.

Factual Basis: Prop. Find. Section IX.E.

Legal Basis: Opening Br. pp. 24-30; Reply Br. pp. 24-27; Supp’l Br. pp. 7-9.

14. There is a heavy presumption against prior restraints of speech of any kind.

Legal Basis: Opening Br. pp. 25, 29.

15. The Statute directs ISPs to block particular URLs and thereby any future content at those URLs, not specific images or content on the Internet.

Factual Basis: Prop. Find. ¶¶ 52-55, 145, 390.

Legal Basis: Opening Br. pp. 25-27; Reply Br. pp. 24-26.

16. The censorship of any future content at particular URLs in this case is like the enjoining of future publication or circulation of a particular periodical because of past potentially defamatory statements in that periodical, which was found unconstitutional in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

Legal Basis: Opening Br. pp. 27-28; Supp’l Br. p. 7-8.

17. The censorship of any future content at particular URLs in this case is like the enjoining of future exhibition of movies at a theater that had exhibited obscene films in the past, which was found unconstitutional in *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

Legal Basis: Opening Br. pp. 28-29; Supp’l Br. pp. 7-8.

18. Whether URLs themselves constitute speech, are fungible, or are in short supply is irrelevant under *Near* and *Vance* (however, URLs can constitute speech, are not fungible, and are in short supply).

Legal Basis: Opening Br. p. 30 n.19; Reply Br. pp. 26-27.

19. As a procedural matter, to comply with the Constitution there would have to be nearly constant review of the banned web sites to ensure that a permanent ban did not censor protected speech, with a full adversarial hearing each time the site changes.

Legal Basis: Supp'1 Br. pp. 7-9.

III. SUBSTANTIVE FIRST AMENDMENT VIOLATIONS

A. The Statute and Informal Notices burden speech.

20. The over-blocking of web sites is a direct result of ISPs' attempts to comply with the Statute and Informal Notices. For First Amendment purposes, the Statute and Informal Notices must be evaluated based on the actions that ISPs have, in fact, taken in order to comply.

Factual Basis: Prop. Find. Section IX.A,B,C.

Legal Basis: Opening Br. pp. 30-31; Reply Br. pp. 3-8; Supp'1 Br. pp. 10-14.

21. This case is just like *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000), where a challenge was mounted against a requirement imposed on cable operators to solve the problem of "signal bleed" of sexually oriented programming. Cable operators were given two options for compliance, but most chose the more speech-restrictive option because of economic and technical limitations and their desire to avoid sanctions. Thus, the practical effect of the law was to over-restrict speech. Likewise here, ISPs evaluated economic and technical

limitations and the desire to comply fully with the law to avoid criminal penalties, and chose compliance methods that resulted in the over-blocking of web sites.

Factual Basis: Prop. Find. Section VIII.B,C,D.

Legal Basis: Reply Br. pp. 3-6; Supp'l Br. pp. 12-13.

22. Inhibitions as well as prohibitions on speech can violate the First Amendment.

Legal Basis: Reply Br. pp. 4-5; Supp'l Br. pp. 10-12.

23. Even if the Court needed to inquire into the ISPs' methods of complying with the Statute and Informal Notices (and it does not), it would find that they had no options available to them that would both shield them from liability and not suppress innocent speech.

Factual Basis: Prop. Find. Section VIII.C.

Legal Basis: Reply Br. pp. 8-14; Supp'l Br. pp. 14-27.

24. The responsibility for the over-suppression of speech lies squarely with the State of Pennsylvania.

Factual Basis: Prop. Find. Section IX.A.

Legal Basis: Opening Br. pp. 30-31; Reply Br. pp. 3-8; Supp'l Br. pp. 10-27.

B. The Statute is unconstitutional because it is substantially overbroad.

25. Under the substantial overbreadth doctrine, a law must be struck down if it suppresses a substantial amount of protected expression.

Legal Basis: Opening Br. p. 31; Supp'l Br. pp. 27-28.

26. In most overbreadth cases, the overbreadth is simply a prediction, which is why it must be substantial to justify facial invalidation of the Statute. In this case, the substantial overbreadth of the Statute is not just a prediction; it is certain.

Factual Basis: Prop. Find. Section IX.B,C.

Legal Basis: Opening Br. p. 32.

27. An overbreadth challenge is based on a statute's possible direct and indirect burdens on speech.

Legal Basis: Opening Br. pp. 31-32; Supp'1 Br. pp. 27-29.

28. Because the Statute results in the suppression of a substantial amount of protected expression, it must be invalidated on its face.

Factual Basis: Prop. Find. Section IX.B,C.

Legal Basis: Opening Br. pp. 31-32; Supp'1 Br. pp. 27-29.

C. The Statute and Informal Notices are unconstitutional as applied.

29. Strict scrutiny applies because the Statute and Informal Notices are content-based speech restrictions.

Legal Basis: Opening Br. pp. 32-33; Reply Br. pp. 42-43.

30. Under strict scrutiny, the Attorney General bears the burden of demonstrating that the Statute and Informal Notices are narrowly tailored to promote the state's compelling government interest in combating child pornography. He has not met that burden.

Factual Basis: Prop. Find. Section XII.B.1.

Legal Basis: Opening Br. pp. 34-40; Reply Br. pp. 43-44; Supp'1 Br. pp. 29.

31. First, the Attorney General has not met his burden under strict (or even intermediate) scrutiny of demonstrating that the Statute and Informal Notices serve the government's interest directly and materially.

Factual Basis: Prop. Find. Section XII.B.1.

Legal Basis: Opening Br. pp. 34-36; Reply Br. pp. 43-44; Supp'1 Br. pp. 29-32.

32. Users of child pornography and web site operators could employ a number of methods to easily circumvent IP filtering, Domain Name System (“DNS”) filtering, and URL filtering.

Factual Basis: Prop. Find. Section XI.B.

Legal Basis: Opening Br. p. 35; Supp’l Br. pp. 31-32.

33. Second, the Statute and Informal Notices are not the least restrictive alternative for furthering the government’s interest. Plaintiffs have offered several plausible, less restrictive alternatives, and the government has not met its burden of proving that those alternatives will be ineffective to achieve the state’s goals.

Factual Basis: Prop. Find. Section XII.B.2.

Legal Basis: Opening Br. pp. 36-40; Reply Br. pp. 43-44; Supp’l Br. pp. 32-36.

34. These less restrictive alternatives include: (1) The government can enforce existing laws by prosecuting child pornographers and working with local, federal and overseas authorities to go after producers and distributors; and (2) the Attorney General can directly contact web hosts and ask them to remove the illegal content from the Internet entirely, which is an effective alternative that the Attorney General has already used 70 times.

Factual Basis: Prop. Find. Section XII.B.2.

Legal Basis: Opening Br. pp. 36-40; Reply Br. pp. 43-44; Supp’l Br. pp. 33-36.

35. The Statute and Informal Notices would also fail intermediate scrutiny, although intermediate scrutiny does not apply because the Statute and Informal Notices are not restrictions on the time, place or manner of speech.

Legal Basis: Reply Br. pp. 42-44.

36. Under intermediate scrutiny, the Statute and Informal Notices would fail because they restrict far more speech than is necessary to further the government's interest, given that other plausible alternatives are available.

Factual Basis: Prop. Find. Section XII.B.1,2.

Legal Basis: Reply Br. pp. 42-44; Supp'l Br. pp. 30 n.20.

IV. PROCEDURAL FIRST AND FOURTEENTH AMENDMENT VIOLATIONS

A. The Statute is unconstitutional because it lacks the necessary procedural safeguards under the First Amendment.

37. There is a heavy presumption against prior restraints of speech of any kind, and the most rigorous procedural safeguards are required.

Legal Basis: Opening Br. pp. 40-41; Reply Br. pp. 29-30; Supp'l Br. pp. 36-37.

38. The Statute violates a long line of Supreme Court cases that have articulated clear procedural requirements for any prior restraint of speech: (1) an adversarial hearing; (2) with the burden on the censor; and (3) with clear opportunity for prompt judicial review and appeal.

Legal Basis: Opening Br. pp. 41-43; Supp'l Br. pp. 36-37.

39. The Statute provides no hearing for the ISP or any web site owner, and no notice (except to the ISP when notified that it must block the URL within five days).

Factual Basis: Section V.A.C.

Legal Basis: Opening Br. pp. 41-43; Reply Br. pp. 34-35.

40. The fact that an ISP could refuse to comply and be subject to criminal prosecution does not provide an adequate hearing. First, it does nothing for the procedural rights of web site owners. Second, it is an unlikely scenario because ISPs have no incentive to risk prosecution, and should not be required to break the law in order to get a hearing. Third, it is not clear that

the question of whether the materials constitute child pornography would be decided in a criminal trial of an ISP because the crime is defined simply as not complying with the court's blocking order.

Factual Basis: Prop. Find. ¶ 144.

Legal Basis: Reply Br. pp. 34-37.

41. The Statute also violates the First Amendment because it provides no *prior* hearing for an ISP or any web site owner. A prior hearing is required before taking a publication – like a web site – out of circulation completely.

Factual Basis: Prop. Find. Section V.A,C.

Legal Basis: Opening Br. pp. 43-44.

42. The Statute is also procedurally defective because it requires only an *ex parte* judicial determination that there is probable cause that the content constitutes child pornography. A probable cause determination is insufficient to remove content from circulation.

Factual Basis: Prop. Find. ¶¶43, 151-154.

Legal Basis: Opening Br. pp. 44-45; Reply Br. p. 37; Supp'l Br. pp. 36-37.

B. The Informal Notices are unconstitutional because they lack the necessary procedural safeguards under the First Amendment and *Bantam Books*.

43. The Informal Notices violate the First Amendment because they constitute coercive government action resulting in the suppression of speech under *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), and lack the requisite procedural safeguards.

Factual Basis: Prop. Find. Section VI.A,C,D.

Legal Basis: Opening Br. pp. 52-54; Reply Br. pp. 37-42.

44. This case is directly parallel to *Bantam Books*, where a state commission provided “informal” notices to book distributors asking their cooperation in removing “objectionable”

materials from their news stands. The Supreme Court found this to violate the First Amendment because it was coercive and provided no safeguards against the suppression of constitutionally protected materials.

Factual Basis: Prop. Find. Section VI.C,D.

Legal Basis: Opening Br. pp. 52-54.

45. Here too, the Attorney General alone decided what web sites should be blocked and used an informal but coercive process to order ISPs to block access to them.

Factual Basis: Prop. Find. Section VI.C.

Legal Basis: Opening Br. pp. 52-54, 57; Reply Br. pp. 38-42.

46. The Informal Notices lack all the procedures that the Statute does, and they are not even subject to an *ex parte* judicial hearing.

Factual Basis: Section VI.

Legal Basis: Opening Br. pp. 54-55.

C. The Statute and Informal Notices are unconstitutional because they lack the necessary procedural safeguards under the Fourteenth Amendment.

47. The minimum Fourteenth Amendment requirements for deprivation of a liberty or property interest, such as First Amendment rights, are notice and an opportunity to be heard.

Legal Basis: Opening Br. pp. 49-50; Reply Br. p. 33.

48. Web site owners – both those targeted and those who were not targeted but whose sites fell victim to over-blocking – get no notice and no hearing under the Statute and Informal Notices.

Factual Basis: Prop. Find. Sections V.C, VI.C.

Legal Basis: Opening Br. pp. 50-51, 54-55.

49. ISPs get no hearing under the Statute and Informal Notices, and are only notified after the fact that a particular web site has been deemed illegal and that they have five days to disable access to it. The fact that an ISP could refuse to comply and be subject to criminal prosecution does not provide an adequate hearing.

Factual Basis: Prop. Find. ¶¶ 151-153.

Legal Basis: Opening Br. pp. 51, 54-55.

50. Internet users get no notice and no hearing, and there is no open court hearing providing the ability to obtain information about how their Internet access is being affected.

Factual Basis: Prop. Find. ¶ 151.

Legal Basis: Opening Br. pp. 51, 54-55.

51. The *Mathews v. Eldridge*, 424 U.S. 310 (1976), three-factor balancing test only addresses what additional procedures, beyond the bare minimum of notice and an opportunity to be heard, are needed. Because even the minimum procedures are not in place here, there is no need to evaluate the three *Mathews* factors.

Legal Basis: Reply Br. p. 33 n.23.

D. The fact that the Statute and Informal Notices are directed at child pornography does not change the procedural requirements.

52. Child pornography laws create a risk of over-suppression of speech that can lead to First Amendment violations, just as obscenity laws can.

Legal Basis: Opening Br. pp. 45-49; Reply Br. pp. 28-32; Supp'1 Br. pp. 37-39.

53. Although there are more serious governmental concerns in the child pornography context than in the obscenity context, the Supreme Court has addressed those by permitting a lower *substantive* First Amendment standard for child pornography; it has not changed any procedural requirements. *New York v. Ferber*, 458 U.S. 747 (1982).

Legal Basis: Opening Br. pp. 47-48; Supp'1 Br. pp. 37-39.

54. To the extent two lower court cases, *United States v. Moore*, 215 F.3d 681 (7th Cir. 2000), and *Camfield v. City of Oklahoma City*, 248 F.3d 1214 (10th Cir. 2001), suggest otherwise, they are distinguishable and incorrect.

Legal Basis: Opening Br. pp. 45-46; Reply Br. pp. 29-32.

55. First, *Moore* and *Camfield* are premised on the factually incorrect presumption that it is easier to identify child pornography than obscenity. The Supreme Court explained in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), that with the increasing prevalence of computer-generated images, it is no longer so easy to tell what is unprotected child pornography. In *Lesoine v. County of Lackawanna*, 77 Fed. Appx. 74, 80, 2003 U.S. App. LEXIS 16691, at *16 (3d Cir. 2003), the Third Circuit reached the same basic conclusion specifically with regard to the Pennsylvania child pornography law.

Factual Basis: Prop. Find. Section IV.D.

Legal Basis: Opening Br. pp. 47-48; Reply Br. pp. 30-31, 34; Supp'1 Br. pp. 37-39.

56. Second, there was little risk in *Moore* and *Camfield* of the suppression of protected speech because they involved static and physically independent items, magazines and videos. In this case, on the other hand, the risk of over-blocking is very high because of the technical architecture of the Internet. That type of risk is precisely the reason that the Supreme Court has imposed strict procedural safeguards on prior restraints of speech.

Legal Basis: Opening Br. pp. 48-49; Reply Br. pp. 31-32.

57. Third, even if *Moore* and *Camfield* were correct, the most they suggest is that there is no requirement for a hearing prior to the web site blocking. There would still have to be a

prompt hearing afterward, which the Statute and Informal Notices do not provide for (prompt or otherwise).

Factual Basis: Prop. Find. Section V.C

Legal Basis: Opening Br. p. 49 n.23; Reply Br. pp. 32-34.

58. The Attorney General is wrong that no hearing is required because a hearing would add little to no value to a child pornography determination.

Factual Basis: Prop. Find. Section IV.D.

Legal Basis: Reply Br. pp. 32-34.

V. COMMERCE CLAUSE VIOLATION

A. The Statute and Informal Notices constitute *per se* violations of the Commerce Clause.

59. Because the Statute has the practical effect of regulating commerce occurring wholly outside Pennsylvania's borders by literally halting communications that would otherwise have taken place outside of Pennsylvania, it is *per se* invalid under the Commerce Clause.

Factual Basis: Prop. Find. Section XIII.

Legal Basis: Opening Br. pp. 58-61; Reply Br. pp. 44-45; Supp'l Br. pp. 40-42.

60. Other state regulation of the Internet has been found *per se* invalid under the Commerce Clause because it constitutes a projection of state law into conduct occurring wholly outside that state.

Legal Basis: Opening Br. pp. 58-59; Supp'l Br. pp. 41-42.

61. There can be no dispute that legal web sites have been blocked to individuals outside of Pennsylvania.

Factual Basis: Prop. Find. ¶¶67-573.

Legal Basis: Opening Br. pp. 60-61; Reply Br. pp. 44-45; Supp'1 Br. pp. 41.

B. The Statute and Informal Notices violate the Commerce Clause because they subject interstate use of the Internet to inconsistent regulations.

62. Under the Commerce Clause, certain types of commerce demand consistent treatment and therefore should be regulated only on a national level.

Legal Basis: Opening Br. pp. 62-63; Supp'1 Br. pp. 42-43.

63. The Internet falls within that group because it recognizes no political boundaries, and heavy regulation by any single state could be disastrous.

Factual Basis: Prop. Find. ¶¶ 568-573, 575-576.

Legal Basis: Opening Br. pp. 62-65; Supp'1 Br. pp. 42-43.

64. At least three other states have proposed laws like Pennsylvania's. If many states started issuing orders to block URLs, it could bring the Internet to its knees. ISPs would be subject to the risk of inconsistent sets of blocking orders or blocking methods.

Factual Basis: Prop. Find. ¶¶ 574-576.

Legal Basis: Opening Br. pp. 62-63; Supp'1 Br. p. 43.

65. There is strong congressional support for a national policy of precluding all state regulation of the Internet. Congress consistently preempts state laws when it enacts legislation affecting the Internet, and it has already granted immunity to ISPs for content that is merely accessible through the ISP.

Factual Basis: Prop. Find. ¶¶77.

Legal Basis: Opening Br. pp. 63-65.

C. The Statute and Informal Notices violate the Commerce Clause because the burdens they impose on interstate commerce exceed any local benefit.

66. The balancing test for indirect regulations of interstate commerce requires a two-part inquiry: whether the state's interest is legitimate, and whether the burden on interstate commerce is outweighed by the local benefit derived from the law.

Legal Basis: Opening Br. p. 61; Supp'l Br. pp. 43-44.

67. Here, the state's interest is clearly legitimate, but the enormous burden on interstate commerce outweighs the local benefit. The Statute and Informal Notices are not particularly effective methods for combating child pornography, yet they result in potentially millions of web sites being blocked outside of Pennsylvania.

Factual Basis: Prop. Find. Section XI.A,B,C; Section XII.1.

Legal Basis: Opening Br. pp. 61-62; Reply Br. pp. 44-45; Supp'l Br. pp. 43-44.

68. The Statute and Informal Notices violate the Commerce Clause balancing test.

Factual Basis: Prop. Find. Section 13.

Legal Basis: Opening Br. pp. 61-62; Supp'l Br. pp. 43-44.

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